United Nations CCPR/C/DEU/CO/6/Add.1

International Covenant on Civil and Political Rights

Distr.: General
17 January 2014

Original: English

Human Rights Committee

Concluding observations on the sixth periodic report of Germany

Addendum

Information received from Germany on follow-up to the concluding observations*

[21 October 2013]

Introduction

1. On 30 and 31 October 2012, the Human Rights Committee adopted its concluding observations on the sixth periodic report and requested Germany, in paragraph 20, to provide up-to-date information on three concluding observations (paras. 11 and 14-15) by 31 October 2013.

> *(20) In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should provide, within one year, relevant information on its implementation of the Committee's recommendations made in paragraphs 11, 14 and 15 above.*
>
> In detail:
>
> *(11) While noting that the transfers of asylum seekers under the Dublin II Regulation have been suspended to Greece until January 2013 due to difficult reception conditions, the Committee is concerned that despite rulings by the German Constitutional Court, the European Court of Human Rights and the European Court of Justice, Section 34a subs. 2 of the Asylum Procedure Act, excluding provisional legal protection in the case of transfers to safe third States and to Member States of the European Union and other European States bound by the Dublin II Regulation, remains in force and continues to be applied by certain domestic courts (arts. 7 and 13).*

* The present document is being issued without formal editing.

The State party should revise its Asylum Procedure Act to allow suspensive orders in case of transfers of asylum seekers to any State bound by the Dublin II Regulation. The State party should also inform the Committee whether it will extend the suspension of transfers of asylum seekers to Greece beyond January 2013.

A. Amendment of the Asylum Procedure Act

2. Within the framework of implementing Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (recast of the Qualification Directive), primarily section 34a of the Asylum Procedure Act (*Asylverfahrensgesetz*, AsylVfG) has been amended and will now read as follows:

(a) If the foreigner is to be deported to a safe third country (sect. 26a) or to a country responsible for processing the asylum application (sect. 27a), the Federal Office shall order his deportation to this country as soon as it has been ascertained that the deportation can be carried out. This shall also apply if the foreigner has submitted his asylum application in another State responsible for carrying out the asylum proceedings pursuant to legal provisions of the European Union or pursuant to an international convention, or if he has withdrawn the asylum application prior to the decision by the Federal Office. No prior deportation warning or deadline shall be necessary;

(b) Motions pursuant to section 80 (5) of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*, VwGO) challenging the order for deportation must be submitted within one week after notification thereof. Where such a motion has been submitted in a timely manner, deportation shall not be permissible before the court decision is handed down.

3. In implementation of the case law of the European Court of Human Rights, the European Court of Justice and Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the member State responsible for examining an application for international protection lodged in one of the member States by a third-country national or a stateless person (recast of the Dublin Regulation), this legal reform is designed to guarantee that all objections to transfers under the Dublin Regulation can be asserted in a timely manner and that legal review can be sought in a court proceeding before the transfer.

4. This reform of section 34a AsylVfG entered into force on 6 September 2013. Correspondingly, the Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge, BAMF) will start executing Dublin transfers only after the one-week time limit for submitting a legal remedy pursuant to section 80 VwGO has expired, or after the competent administrative court has rejected the expedited motion. If the expedited motion has been filed in a timely manner, transfer will remain impermissible until the court has decided on the motion under section 80 VwGO.

B. Suspension of transfers of asylum seekers to Greece

5. In January 2011, the Federal Ministry of the Interior suspended the return of asylum seekers to Greece on the basis of the Dublin Regulation. On 28 November 2012, the Interior Ministry decided to extend the suspension for an additional year until January 2014.

(14) While welcoming the steps taken by the State party to revise its legislation and practice on post-conviction preventive detention in accordance with human rights standards and noting information that a draft bill addressing the issue is currently before Parliament, the Committee is concerned about the number of persons who are still detained in such detention in the State party. It is also concerned about the duration of such a detention in some cases as well as the fact that conditions of

detention have not been in line with human rights requirements in the past (arts. 9 and 10).

The State party should take necessary measures to use the post-conviction preventive detention as a measure of last resort and create detention conditions for detainees which are distinct from the treatment of convicted prisoners serving their sentence and only aimed at their rehabilitation and reintegration into society. The State party should include in the Bill under consideration, all legal guarantees to preserve the rights of those detained, including periodic psychological assessment of their situation which can result in their release or the shortening of the period of their detention.

6. The Act to Effect Implementation under Federal Law of the Distance Requirement in the Law Governing Preventive Detention (Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebots im Recht der Sicherungsverwahrung) of 5 December 2012 (Federal Law Gazette I, p. 2425) entered into force on 1 June 2013. The Act is enclosed (annex 1).

7. The Act implements the requirements that the Federal Constitutional Court set out in its leading judgement of 4 May 2011 and represents the federal-law element of the new freedom-oriented and therapy-based overall concept of preventive detention for implementing the so-called distance requirement (difference in treatment between preventive detainees and prisoners serving sentences).

8. The new section 66c of the Criminal Code sets out essential guiding principles regarding the treatment and placement of preventive detainees and preparations for their release. It is clearly treatment-oriented. The objective is to minimize the threat which those placed in preventive detention pose to the general public to such an extent that the deprivation of liberty can be terminated as soon as possible. Further interference over and above the requisite deprivation of "external" liberty must also be avoided. At the end of a term of imprisonment the court already examines whether the execution of preventive detention is still necessary in order to achieve its purpose. Now the court will also examine whether placement in preventive detention would be disproportionate because the perpetrator was not offered adequate treatment options during the execution of his prison sentence. Where this is the case, the execution of preventive detention must be suspended on probation, i.e. the person concerned must be released.

9. The courts also examine whether the preventive detainee has been offered adequate treatment options. This is done in the context of the regular judicial reviews stipulated by section 67e (2) of the Criminal Code, which are carried out to determine whether preventive detention should continue. In future, these will be conducted annually and, after 10 years of preventive detention, every nine months. Where this is not the case, the court must set a deadline by which the principle of providing adequate care must be complied with. Where adequate treatment options are still not available after this deadline has passed, the execution of preventive detention must be suspended on probation, i.e. the person concerned must be released.

10. Within Germany's federal structure it is the Länder that are responsible for the execution of preventive detention, which is why the distance requirement also needs to be implemented in Land law. The Länder have set up a working group which has drawn up a joint draft of a law to effect implementation of the requirements of the Federal Constitutional Court and the guidelines set by the federal legislature regarding the execution of preventive detention. The reforms that each of the Länder has introduced on the basis of this joint draft will represent the Land-law element of the new freedom-oriented and therapy-based overall concept of preventive detention.

11. This joint draft is therefore not a model bill; rather, the Länder, which are responsible for executing preventive detention, are able to incorporate the proposed rules

into their existing laws governing execution (where applicable) or systematically adapt the rules to their existing legal structures.

12. As far as content is concerned, the draft specifies the objective of execution in more detail; it requires that execution be freedom-oriented and therapy-based in order to enable preventive detainees to be released as early as possible by effectively reducing the risk they pose; it contains rules on organizing the detainees' everyday activities, which differ significantly from those serving prison sentences, and provisions to supplement prison laws governing the specifics of the execution of a prison sentence which precedes preventive detention.

13. As regards practical implementation of the distance requirement, new facilities to house preventive detainees are currently being constructed in the Länder or existing buildings are being altered, for example to create larger living areas and courtyards and to upgrade furnishings in detainees' living spaces. These measures will create facilities that are suited to executing preventive detention in a treatment-based and freedom-oriented manner.

14. As regards the measures being taken at each institution, the Federal Government refers to its recent report to the Committee of Ministers of the Council of Europe on the implementation of the M Group of judgments of the European Court of Human Rights (annex 2).

> *(15) The Committee is concerned about the reported incidences of physical restraints applied, in particular, to dementia sufferers in residential homes, including being tied to a bed or kept behind closed doors, which are applied in contravention of applicable legal provisions limiting the use of such measures (arts. 7, 9, and 10).*
>
> *The State party should take effective measures to ensure full implementation of legal provisions related to the use, in compliance with the Covenant, of physical restraint measures in residential homes, including by improving training of staff, regular monitoring, investigations and appropriate sanctions for those responsible.*

15. In its response to the list of issues, the Federal Government already pointed out several such measures, including the "ReduFix" projects and the "Werdenfelser Weg". In the following, a range of measures carried out at the federal and Land level will be given as examples:

"*Werdenfelser Weg*"

16. The so-called "Werdenfelser Weg" is a procedural approach developed by Garmisch-Partenkirchen Local Court and the adult guardianship division at the district commissioner's office in Garmisch-Partenkirchen which is available within the applicable legal framework for adult guardianship and procedure, and is aimed at avoiding the use of physical restraints and measures involving deprivation of liberty.

17. The main objective of the "Werdenfelser Weg" is to ensure that care-based alternatives to physical restraint measures are thoroughly examined and discussed with all persons involved in the framework of judicial proceedings.

18. In order to achieve this, courts no longer appoint an attorney as guardian *ad litem* for the individual concerned (as was the case before). Instead, a person is appointed who has specific experience in the field of caregiving (courts form a pool of possible guardians *ad litem* made up of care professionals who have received legal training). The guardian *ad litem* then discusses the case with the care home, the person concerned and this person's relatives, and identifies suitable care-based alternatives. This often leads to the application for approval of measures involving deprivation of liberty being withdrawn. If this does not

happen, the court makes a decision. If, in the court's view, there is an adequate alternative, the requested approval is not granted.

19. Similar projects now exist not only in Bavaria, but also in other Länder. On 1 August 2012, Hamburg, for instance, launched the project "Werdenfelser Weg in Hamburg, Care without Restraint" (Werdenfelser Weg in Hamburg, Pflege ohne Zwang).

20. With the first year of the project complete, the first group of specialized guardians *ad litem* are now available in Hamburg, and their services are being used by the adult guardianship courts. Moreover, care homes and care service providers have participated in specialized training courses which have led to a critical examination of measures involving deprivation of liberty at the institutions concerned, and a desire to do without such measures as far as possible in future.

"*ReduFix*"

21. The two projects supported by the Federal Government, "ReduFix" (2004 to 2006) and "ReduFix Praxis" (2007 to 2009), were also mentioned in the responses to the list of issues. Both projects have shown that it is possible to reduce the use and duration of physical restraints without raising the frequency of injuries due to falls, especially for dementia sufferers in care homes, if the care staff receive special training, alternative options are provided, and decent records are kept.

22. Stage two has involved taking this experience and putting it into practice throughout Germany under the programme "ReduFix Praxis". After conceptual and strategic coordination with the Länder, seminars and events were held to train different target groups, and courses were offered to "train the trainers". More detailed information on the projects is available at www.redufix.de.

Training and information

23. The principles of good care and self-determination for those who receive care are laid down in the Long-Term Care Charter (Pflege-Charta) which presents and explains the rights of people in need of long-term care and assistance in a way that is practical and easy to understand. This charter provides useful information for individuals who receive care, as well as their relatives and voluntary and professional caregivers, so that care-related rights can be exercised in practice.

24. The Federal Ministry for Family Affairs, Senior Citizens, Women and Youth currently supports a project called "Information and Advice on Prevention and Support in Cases of Abuse and Neglect of Vulnerable Elderly or Disabled Persons" (*Information und Beratung zur Prävention und Hilfe bei Misshandlung und Vernachlässigung schutzbedürftiger älterer und behinderter Menschen*).

25. The project aims to increase public awareness of the issue of abuse and neglect among vulnerable elderly and disabled people.

26. The "Guidelines on the Prevention of Measures to Restrict Liberty in the Field of Professional Care for the Elderly" (*Leitlinie zur Vermeidung freiheitseinschränkender Maßnahmen in der beruflichen Altenpflege*), which were compiled with the support of the Federal Ministry of Education and Research, are receiving more and more attention and are increasingly being applied by care professionals.

27. Thanks to the Geriatric Nursing Act (Gesetz über die Berufe in der Altenpflege des Bundes, AltPflG), which entered into force on 1 August 2003, the training of care staff for elderly people is, for the first time, uniformly regulated throughout Germany.

28. This Act strives to ensure a nationwide standard of training, as well as to enhance the attractiveness of the occupation and to give it a clear profile. This goal is achieved with

uniform rules on training structures, curriculum and examination requirements applicable throughout Germany.

29. The Ordinance on Training and Examinations for Geriatric Nurses (Ausbildungs- und Prüfungsverordnung für den Beruf der Altenpflegerin und des Altenpflegers, AltPflAPrV) provides minimum requirements for training pursuant to the Geriatric Nursing Act, and contains details regarding the State examination for geriatric nurses.

30. The three-year course of training to become a geriatric nurse combines theoretical and practice-related classroom instruction (at least 2,100 hours) with practical training (at least 2,500 hours). Classroom instruction at geriatric nursing schools thoroughly prepares students for their future responsibilities and gives them a comprehensive understanding of workplace processes.

31. The Länder are responsible for implementing the Geriatric Nursing Act and the Ordinance on Training and Examinations for Geriatric Nurses. They issue implementation provisions in order to set the exact curriculum for trainee geriatric nurses and regulate the details of training in the fields and areas stipulated by the federal legislator. The issue of physical restraints in care facilities is dealt with in the classroom.

32. This issue will also be one of the main topics of the "Alliance for People with Dementia" (Allianz für Menschen mit Demenz) which forms a part of the Federal Government's demographic strategy. This agenda will be developed by April 2014 under the auspices of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth and the Federal Ministry of Health as lead agencies, working together with representatives of the self-governing health-care administration, medical associations, research community and civil society. It will provide for specific measures in the problematic field of physical restraints.

33. In addition to this, several Länder have been offering their own comprehensive information and training programmes within their fields of responsibility. For instance, the following initiatives have been adopted in Bavaria alone:

- Guidelines on "Responsible Management of Measures Involving Deprivation of Liberty in Care Environments" (*Verantwortungsvoller Umgang mit freiheitsentziehenden Maßnahmen in der Pflege*), 2006
- A Bavaria-wide competition called "Free Spirit" (*FreiMut*), 2007
- Specialist conferences for care professionals, guardians and judges dealing with guardianship cases
- Support for care-related training courses with a focus on the prevention of measures involving deprivation of liberty
- A campaign entitled "Restrained by Your Care" (*Eure Sorge fesselt mich*): DVD with poster and flyer, 2011.

34. Most recently, with its "Restrained by Your Care" campaign, the Bavarian Social Affairs Ministry raised awareness of the fact that physical restraints and tranquillizers are not methods of choice. The core of the campaign was a DVD produced by the Ministry with specialist support from those responsible for the "ReduFix" project. The DVD provides information on the issue of measures involving deprivation of liberty, with two short films clearly demonstrating how to avoid such measures being used. The Social Affairs Ministry provided this DVD alongside further information materials on this issue free of charge to about 3,000 Bavarian residential and non-residential care facilities. Moreover, Bavarian family doctors were given information materials to hand out to caregiving relatives.

35. The "Hamburg Concept for Fighting Gender-Specific Violence, Trafficking in Human Beings and Violence in Long-Term Care" (*Hamburger Konzept zur Bekämpfung von geschlechtsspezifischer Gewalt, Menschenhandel und Gewalt in der Pflege*), addresses the issue of deprivation of liberty in both residential and non-residential care homes in order to educate and inform the public and experts in the field.

36. The creation of long-term care support centres has already led to major improvements in the advice offered to caregivers and people in need of care.

37. Low-threshold respite and support for caregivers in the form of home visits and care groups is being promoted and expanded, especially for those dealing with dementia sufferers. The same is true of self-help groups.

38. In 2011/2012, based on the "ReduFix" training programme, the Land of Rhineland-Palatinate offered "train the trainers" courses at all facilities for the elderly.

39. Additionally, requests were made for presentations and short courses. These provided information to about 1,350 people with different professional backgrounds working in different institutions. Moreover, a two-day "train the trainers" course was held.

40. A brochure entitled "There is another way!" (*Es geht auch anders!*), which is now already in its second edition, was developed for relatives and guardians in order to inform them about the risks of measures involving deprivation of liberty and to offer alternatives to such measures.

41. In addition to the new statutory requirements described above, the Land of Hesse has developed a Hesse-wide interdisciplinary training concept under the title "Legal Guardianship, Medicine and Care: Working together to Prevent Measures Involving Deprivation of Liberty" (*Netzwerkarbeit von rechtlicher Betreuung, Medizin und Pflege zur Vermeidung freiheitsentziehender Maßnahmen*).

Excerpt from a flyer (translated from German)

Starting point

42. Caregivers, doctors and those working professionally or voluntarily with adult guardianship law depend on solid cooperation, especially where applications for the approval of measures involving deprivation of liberty at residential facilities for the elderly or disabled are concerned (e.g. bed rails, straps, wheelchair trays). The latest court decisions and requirements for the prevention of measures involving deprivation of liberty laid down in the Hessian Act on Assistance and Care Services of March 2012 (Hessisches Gesetz über Betreuungs- und Pflegeleistungen, HGBP) make it clear that both legal practitioners and caregivers need to get to grips with this issue.

43. Every person directly or indirectly involved in the approval procedure will have a difficult assessment to make when deciding for or against coercive treatment and measures involving deprivation of liberty.

Objective

44. The training programme consists of modules, each of which is a self-standing course. Questions regarding the legal context, medical treatment, care and professional ethics as well as conflict management and communication techniques are discussed on an interdisciplinary basis in order to expand the use of networks at various levels. The examples of the "Werdenfelser Weg" and "ReduFix", as well as various case studies, demonstrate how measures involving deprivation of liberty can be reduced to a minimum and legal certainty guaranteed for all parties involved.

45. Participants from caregiving professions can qualify as guardians *ad litem* by participating in modules 1 to 4.

Target group

46. Employees from caregiving and medical professions, adult guardianship courts, guardianship authorities and guardianship associations, as well as professional guardians, honorary guardians, care home directors, etc.

47. Fortunately, assistance and care facilities are becoming more and more aware of this issue, as has been observed by the Hessian Guardianship and Care Supervisory Authority (Betreuungs- und Pflegeaufsicht) in the context of its assessments and advisory services.

48. In Saarland, all key figures involved in caregiving have been informed about the possibilities of reducing or completely avoiding measures involving deprivation of liberty through a Land-wide campaign entitled "Safety Without Physical Restraints: Measures Involving Deprivation of Liberty Under Review" (*Sicherheit ohne Fixieren – Freiheitsentziehende Maßnahmen auf dem Prüfstand*).

49. In cooperation with the Institute for Health Research and Technology at the University of Applied Sciences of Saarland and the Saarland Care Association (*Saarländische Pflegegesellschaft*), training will be provided from October 2013 to July 2014 for the staff of residential care facilities, including 18 days' training at district level and a further 10 days in 2014 at facilities for disabled people. The aim of this training is to provide an understanding of the legal framework conditions, impart knowledge of the risks and consequences of measures involving deprivation of liberty, and explore alternative measures, ways of determining root causes, possible technical support measures, and methods for advising and informing relatives.

Oversight

50. Within the framework of statutory, unannounced quality controls, the medical services of the health insurance funds (*Medizinische Dienste der Krankenversicherung*, MDK) inspect every accredited residential and non-residential care facility in Germany once a year. As part of these quality controls, MDKs also examine whether measures which restrict liberty are accompanied by the required approval or consent.

51. Pursuant to current MDK surveys, measures involving deprivation of liberty are being applied in about two thirds of all facilities in Baden-Wurttemberg, for example. Even if a restriction of liberty is approved by a court, the necessity of such measure must, as a general rule, be questioned by the facility. A restriction of liberty should be upheld only if there is an overwhelming and currently existing need for the person to be secured.

52. In Saxony, MDK found violations in 14 out of a total of 4,779 examinations conducted last year. The care home inspectorate raised 18 complaints. Further results of the inspections carried out by MDK and the care home inspectorate can be found in their recently published reports (third report of the Medical Service of the central association of health insurance funds [MDS] pursuant to section 114a of the Social Code XI [SGB XI] and the Care Home Report 2010/2011 [Heimbericht 2010/2011]); both reports are available on the Internet.

53. The "Guide for Care Home Inspectorates in Baden-Wurttemberg" (*Orientierungshilfe für die Heimaufsichtsbehörden in Baden-Württemberg*) dedicates an entire chapter to the issue of physical restraints. The guide contains several pages of expert explanations aimed at care home inspectorates on the use of measures involving deprivation of liberty.

54. In addition to this, the two sets of inspection guidelines for inspections conducted by care home inspectorates at care facilities or facilities for the disabled cover a number of issues related to deprivation of liberty.

55. Through training events, the care home inspectorates of the Länder are constantly informed of current developments in the avoidance of measures involving deprivation of liberty. Acting as multipliers, these inspectorates then regularly pass on new insights to the care facilities about the alternatives that might be considered in order to avoid the use of physical restraints, e.g. special beds (lowerable beds), strength and balance training, hip protectors, safety helmets or electronic alarm systems.

56. Staff meetings and expert symposiums for care home inspectorates provide for regular exchange on this issue.

57. If there is a suspicion of a criminal act being committed, the care home inspectorates pass on their findings to the criminal prosecution authorities.

58. With its Act on Living with Care and Guardianship of 1 January 2010 (Pflege- und Betreuungswohngesetz, BbgPBWoG), Brandenburg has created a new basis under Land law for the State supervision of "supported living" within the meaning of this Act. All residential care facilities in Brandenburg that are covered by Book XI of the Social Code are covered by this Act, too.

59. One of the top priorities of the authority in charge of overseeing supported living is to make sure that care service providers safeguard the right to personal freedom (sect. 6 (2) No. 2 BbgPBWoG). Therefore, measures which restrict liberty – no matter what form they take – are permissible only subject to thorough consideration of the facts involving all parties, as well as judicial approval pursuant to section 1906 Civil Code (Bürgerliches Gesetzbuch, BGB) or valid consent by the person concerned.

60. In order to safeguard the aforementioned rights, the Act itself and the accompanying statutory instruments lend further substance to this provision, for example with the following rules:

(a) The care service provider must ensure that its employees are confident in their handling of measures involving deprivation of liberty (sects. 3 and 7 of the Structural Quality Ordinance [Strukturqualitätsverordnung, SQV]);

(b) Only expert staff may monitor the necessity and suitability of permitted measures involving deprivation of liberty (sect. 4 (2) No. 3 SQV);

(c) The nature, time and duration of all measures involving restrictions or deprivation of liberty, and the name of the person responsible for ordering the measure, must be documented in a verifiable manner (sect. 13 (1), second sentence, No. 11 BbgPBWoG);

(d) The care service provider must report any accidents or other unexpected incidents that have led to considerable interferences with the personal freedom of residents without delay to the responsible authority; and

(e) The facility's furnishing must allow for freedom of movement concomitant with the inhabitants' abilities; constructions limiting the access to public space are not allowed (sect. 10 (1) and (2) SQV).

61. In addition to these requirements, there are also requirements and measures to strengthen social awareness in care facilities. By involving the social environment of a person in need of care and by integrating care facilities into a community and into community life, self-contained lifestyles are prevented and a sensitive approach to measures involving deprivation of liberty is promoted. Examples of this include the regulatory possibilities for involving relatives in the provision of care services (sect. 11

BbgPBWoG) and the appointment of ombudspersons by the community (sect. 16 (4) BbgPBWoG, sect. 9 of the Ordinance on the Participation of Care Home Residents [Einrichtungsmitwirkungsverordnung]).

62. In the framework of a facility's conceptual and physical structure, it is possible to create conditions for certain groups of individuals that reduce the need for measures involving deprivation of liberty. For example, small residential groups, designated walking routes and visual barriers can help reduce behavioural problems and the wandering tendencies of people with dementia-type diseases. Aids such as protective body gear, non-slip mats or sensors can help reduce falls.

63. Since the entry into force of the Hessian Act on Assistance and Care Services (HGBP) on 21 March 2012, there has been an explicit statutory provision in Hesse on consultation and controls: Measures involving deprivation of liberty approved by a court must be limited to what is necessary and must be documented, whereby a record of this approval must be attached and the name of the person responsible for ordering the measure must be stated (sect. 5 HGBP). Furthermore, a facility within the meaning of sect. 2 (1) Nos. 1 and 2 HGBP may only be run, for example, if its operator applies recognized methods to avoid measures involving deprivation of liberty and regularly provides training to this effect for its assistance and care staff (sect. 9 (1) No. 7 HGBP).